

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pasadena Neighborhood Coalition,

Complainant,

vs.

Altrio Communications, Inc.,

Defendant.

Case 02-11-053
(Filed November 19, 2002)

**SCOPING MEMO AND RULING
OF ASSIGNED COMMISSIONER**

Summary

Pursuant to Rules 6(b)(3) and 6.3 of the Commission's Rules of Practice and Procedure,¹ this ruling sets forth the schedule, assigns a presiding hearing officer, and addresses the scope of the proceeding, following a prehearing conference (PHC) held on February 28, 2003.

Background

Complainant Pasadena Neighborhood Coalition (Coalition) is a nonprofit organization composed of individual neighborhood associations in the City of

¹ Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

Pasadena (City). The Coalition alleges that defendant Altrio Communications, Inc. (Altrio) is in violation of the requirements of D.01-07-022 (July 12, 2001), which granted Altrio a limited Certificate of Public Convenience and Necessity (CPCN) to provide competitive local exchange services in communities in Los Angeles, Orange, and Ventura counties, utilizing resale of other carriers' services or unbundled network elements (UNEs) and equipment installed solely within existing buildings or structures. The Coalition alleges that Altrio has constructed facilities in Pasadena for its telephone services without returning to the Commission for approval of a full facilities based CPCN, including submittal of a proponent's environmental assessment (PEA) so that the Commission may evaluate the proposed construction pursuant to the California Environmental Quality Act (CEQA), Pub. Res. Code § 21000 *et seq.* The activities objected to by the Coalition include: construction of utility cabinets containing small batteries and gas-powered back-up generators, as well as the associated distribution nodes; hanging cable from existing utility poles; and building new underground conduits (the disputed construction).² The Coalition seeks an order that Altrio stop work on the disputed construction and submit a PEA for past and proposed construction on its system in Pasadena.

Altrio asserts that it is in compliance with its limited facilities-based (LFB) CPCN because the disputed construction is authorized by Altrio's agreement with the City, granting Altrio nonexclusive rights to construct an Open Video System (OVS) in the City. Altrio states that it is not required to seek or obtain

² This list includes activities identified by the Coalition, but is not intended to be exhaustive. The nature and extent of the construction is a subject of the evidentiary hearings (EH).

further approval from the Commission, since the City's authorization of the disputed construction, including a determination that the OVS project is exempt from CEQA, is based on its independent authority over the OVS franchise.

Pursuant to a Ruling of the assigned Administrative Law Judge (ALJ), the parties filed prehearing conference statements addressing the issues in this proceeding, and provided certain documents and additional information. Altrio also filed a Motion to Dismiss on February 24, 2003.³

Pending Litigation

The disputed construction is also the subject of litigation pending in Los Angeles Superior Court. Filed in November 2002 against the City and Altrio, the verified petition for writ of mandate alleges violations of CEQA, of the City's design review requirements, and of the LFB CPCN.⁴ At the PHC, counsel for Altrio stated that no schedule for the court proceedings had been set.

Altrio requested that this proceeding be stayed pending the completion of the Superior Court case. The parties agree there is no assurance that the Superior Court case will be completed prior to the statutory deadline for completion of this proceeding; if there is an appeal of the court case, the appeal will continue long past the timeframe for this proceeding. This proceeding will therefore be conducted on the schedule set out below. Any relevant information

³ At the PHC, the ALJ suggested that Altrio reconsider the timing of its motion to dismiss, since the CEQA issues it raises might be better addressed after, rather than before, the EH. Counsel for Altrio agreed to hold the motion in abeyance, reserving the right to request a decision on the motion prior to the EH.

⁴ In compliance with the ALJ's Ruling, Altrio supplied a copy of the verified petition for writ of mandate.

from the Superior Court case may be made the subject of official notice in this proceeding, pursuant to Rule 73.

Scope of Proceeding

Limited and focused evidentiary hearings will be necessary to resolve the few factual disputes that are expected to remain after the parties complete discovery.

At this time, the material facts in dispute include the following:

- what construction work has Altrio undertaken in the City to allow it to provide its services;
- how are services provided by Altrio within the City;
- is the disputed construction necessary for the provision of Altrio's telephone services;
- does Altrio use the disputed construction to provide telephone services and/or any data services subject to Commission jurisdiction;
- does any portion of the disputed construction carry only voice signals;
- is it possible for Altrio to provide telephone-only services over its shared broadband system;
- does Altrio provide any telephone-only services over its system.

The fundamental legal disputes between the parties arise from differences about the authority granted to Altrio in D.01-07-022, and about the interaction of that authority with the City's franchise authority. At this time, specific disputed legal issues include the following:

D.01-07-022

- whether the LFB CPCN allows Altrio to provide telephone service using facilities that are part of the disputed construction;

- whether Altrio is required to seek a full facilities-based CPCN to provide telephone service using facilities that are part of the disputed construction.

CEQA

- whether Altrio was required to submit a PEA to the Commission for review and evaluation before beginning the disputed construction;
- whether the City's approval of the OVS Agreement and determination of exemption from CEQA apply to the provision of telephone services by Altrio;
- whether the City's approval of the OVS Agreement and determination of exemption from CEQA preclude further review of the disputed construction by the Commission.

Discovery

At the PHC, the Coalition requested a period of formal discovery. The parties also agreed to exchange information informally. In view of the schedule for this proceeding, set forth below, it is important that any discovery disputes be resolved expeditiously. The parties must promptly meet and confer in a good faith effort to resolve any disputes. If that fails, any party may promptly file a written motion in accordance with Rule 45.

Parties shall follow the requirements set forth in the Appendix regarding prepared written testimony and exhibits.

Schedule

The parties have agreed to the following schedule for this proceeding:

Ongoing	Informal and formal discovery
May 12, 2003	Close of formal discovery
May 13, 2003	Concurrent distribution of testimony
May 23, 2003	Concurrent distribution of rebuttal testimony
June 3 and 4, 2003 9:00 a.m.	Evidentiary Hearing, Commission Courtroom, San Francisco
June 25, 2003	Concurrent opening briefs
July 10, 2003	Concurrent reply briefs; submission of case
September 8, 2003	Presiding Officer's decision filed within 60 days of submission
October 8, 2003	Presiding Officer's decision becomes effective 30 days after mailing (unless appeal filed per § 1701.2(a) and Rule 8.2)

It is my goal to close this case within the 12-month timeframe for resolution of adjudicatory proceedings and this schedule meets that goal. At this time, I foresee no extraordinary circumstances which would warrant an extension of the schedule. The presiding officer may, for good cause shown, alter this schedule within the statutory timeframe.

Category of Proceeding and Need for Hearing

This ruling confirms this case as an adjudication scheduled for hearing, as preliminarily determined by the Commission.

Assignment of Presiding Officer

Administrative Law Judge Anne Simon will be the presiding officer.

Ex Parte Rules

Ex Parte communications are prohibited in adjudicatory proceedings under § 1701.2(b) and Rule 7.

IT IS RULED that:

1. The scope of the proceeding is as set forth herein.
2. The schedule for this proceeding is as set forth herein.
3. The presiding officer will be Administrative Law Judge Simon.
4. This ruling confirms that this proceeding is an adjudication scheduled for hearing.
5. Ex parte communications are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7 of the Commission's Rules of Practice and Procedure.

Dated March 19, 2003, at San Francisco, California.

/s/ Geoffrey F. Brown
Geoffrey F. Brown
Assigned Commissioner

Appendix

Prepared Written Testimony and Exhibits

Service

All prepared written testimony should be served on all appearances and state service on the service list, as well as on the Assigned Commissioner's office and on the Assigned ALJ. Prepared written testimony should NOT be filed with the Commission's Docket Office.

Identification of Exhibits in the Hearing Room

Each party sponsoring an exhibit should, in the hearing room, provide two copies to the ALJ and one to the court reporter, and have at least 5 copies available for distribution to parties present in the hearing room. The upper right hand corner of the exhibit cover sheet should be blank for the ALJ's exhibit stamp. Thus, if parties "premark" exhibits in any way, they should do so in the upper left hand corner of the cover sheet. Please note that this directive applies to cross-examination exhibits as well. If there is not sufficient room in the upper right hand corner for an exhibit stamp, please prepare a cover sheet for the cross-examination exhibit.

Cross-examination With Exhibits

As a general rule, if a party intends to introduce an exhibit in the course of cross-examination, the party should provide a copy of the exhibit to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. Generally, a party is not required to give the witness an advance copy of the document if it is to be used for purposes of impeachment or to obtain the witness' spontaneous reaction. An exception might exist if parties have otherwise agreed to prior disclosure, such as in the case of confidential documents.

Corrections to Exhibits

Generally, corrections to an exhibit should be made in advance and not orally from the witness stand. Corrections should be made in a timely manner by providing new exhibit pages on which corrections appear. The original text to be deleted should be lined out with the substitute or added text shown above or inserted. Each correction page should be marked with the word "revised" and the revision date.

Exhibit corrections will receive the same number as the original exhibit plus a letter to identify the correction. Corrections of exhibits with multiple sponsors will also be identified by chapter number. For example, Exhibit 5-3-B is the second correction made to Chapter 3 of Exhibit 5.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner on all parties of record in this proceeding or their attorneys of record.

Dated March 19, 2003, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, *e.g.*, sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.